WEBINAR WEDNESDAYS

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SEARCH AND SEIZURE FOR PROSECUTORS

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Search and Seizure for Prosecutors

Beth Barnes – for APAAC Webinar Wednesdays

Sources

United States Constitution

4th Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Arizona Constitution

Article 2, Section 8 – Right to Privacy

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Miscellaneous Statutes and Rules

Remember a statute or rule may impact a specific search and seizure issue. For example, the statutes addressing warrants [Title 13, chapter 38, article 8], traffic stops [A.R.S. § 28-1594], DUI blood testing [A.R.S. § 28-1388] and medical marijuana [A.R.S. § 36-2811(B – F and H)] as well as the electronic warrant rule [Rule 4.10, *Maricopa Superior Court Local Rules*]. This list is not complete. Keep in mind, the medical marijuana provisions were passed by Proposition 203. Accordingly, they have constitutional status.

Initial Fourth Amendment Analysis

When addressing Fourth Amendment/search and seizure issues, it is important to consider all arguments and theories supporting the admission of the evidence. Remember, raising arguments in the lower courts will preserve them on appeal.

Even if it appears the State will prevail under one of the arguments, I recommend the remainder of the analysis be completed and that all valid argument be presented to the trial court to increase the chances of prevailing on the motion and on appeal.

A. **First inquiry - Does the Fourth Amendment apply?** Before addressing whether the actions of the officer violated the Fourth Amendment, consider whether the protections of the Fourth Amendment apply. Does the defendant have an expectation of privacy concerning the discovered evidence? Was there a search or a seizure? Was

there State Action? If the answer to any of these questions is "no", the protections of the Fourth Amendment do not apply and the evidence should be admissible.

The proponent of a motion to suppress has the burden of establishing personal Fourth Amendment rights were violated. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

1. **Did the suspect have an expectation of privacy?** A person is not afforded the protections of the Fourth Amendment unless he/she has a legitimate expectation of privacy in the area or item searched. *Rakas v. Illinois*, 439 U.S. 128 (1978). The rights under the Fourth Amendment are personal and cannot be asserted vicariously. *Id.* Standing to challenge the search is not automatic. An expectation of privacy is required. *United States v. Salvucci*, 448 U.S. 83 (1980). The burden lies with the defendant to prove standing. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

   Minnesota v. Carter, 525 U.S. 83 (1998). The protections of the Fourth Amendment are meant for people, not places. "[T]o claim Fourth Amendment protection, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable."

   Plain view

   Texas v. Brown, 460 U.S. 730 (1983). There is no legitimate expectation of privacy in the interior of a vehicle that may be viewed from the outside by an officer. An officer may seize an item in plain view as long as the officer's access to the item is justified under the Fourth Amendment. "'Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be". *Brown*, at 738-39.

   United States v. Hensley, 469 U.S. 221, 235 (1985). After a legal stop, officers could legally seize evidence in plain view and arrest the passenger when the evidence discovered in plain view provided probable cause to believe the passenger had committed a crime.

Drivers and Passengers

State v. Acosta, 166 Ariz. 254, 256, 801 P.2d 489, 491 (App. 1990). In general, drivers have standing to challenge the search – even if the car was borrowed.

State v. Orendain, 185 Ariz. 348 (1996) (*overruled on other grounds*). If the owner is in the car, the driver must demonstrate a reasonable expectation of privacy in the area searched.

Byrd v. United States, 138 U.S. 1518 (2018). A driver in lawful possession or control of a rental car generally possesses a reasonable expectation of privacy in the car that is protected by the Fourth Amendment even when he or she is not listed on the rental agreement as an authorized driver.

State v. Gomez, 198 Ariz. 61 (App. 2000). Passengers have standing to challenge the stop of a car.

Rakas v. Illinois, 439 U.S. 128, 143 (1978). Passengers must show a legitimate expectation of privacy in the area searched to challenge the search of a car.

Brendlin v. California, 551 U.S. 249 (2007). A passenger has standing to challenge a search of a car when the initial stop is unwarranted.

State v. Jean, 243 Ariz. 331 (2018). Passenger, sometime driver of commercial vehicle, had expectation of privacy and could challenge warrantless GPS tracker even though he had no authority to exclude others.

Examples where passengers lacked standing. *Rakas v. Illinois*, 439 U.S. 128 (1978). Glove compartment or area under the seat. *State v. Olson,* 134 Ariz. 114, 654 P.2d 51 (App. 1982). Trunk. *State v. Vassar*, 7 Ariz. App. 344, 439 P.2d 507 (1968). Handle of a car door.

Homes (note: AZ may give greater protection)

Minnesota v. Olson, 495 U.S. 91 (1990). An overnight house guest has an expectation of privacy and may seek the protections of the Fourth Amendment.

Minnesota v. Carter, 525 U.S. 83 (1998). Defendant who was observed bagging cocaine in an apartment he had never been to before, had been in for only a short time, and had come to only to package drugs, had no legitimate expectation of privacy in the apartment. [The Court also noted that the expectation of privacy in

commercial spaces is less than the expectation a person has in one's own home.]

Stolen cars

State v. Harding, 137 Ariz. 278 (1983). A defendant lacks standing to object to the search of stolen car. "A thief of property has no legitimate expectation of privacy in stolen goods." *Id.* at 291.

Abandoned Items

Abel v. United State, 362 U.S. 217 (1960). A defendant has no standing to challenge the search of an item which he/she has abandoned.

State v. Walker, 119 Ariz. 121, 579 P.2d 1091 (1978). The issue is did the defendant voluntarily discard, leave behind, or relinquish interest in the property.

State v. Huerta, 223 Ariz. 424, 426 (App. 2010). Defendants preserve no privacy interest in abandoned property. The individual's intent to abandon the property "is determined by objective factors, not the defendant's subjective intent." *Id.* (quoting *People v. Pereira,* 150 Cal.App.4th 1106 (2007)). "The appropriate test is whether defendant's words or actions would cause a reasonable person in the searching officer's position to believe that the property was abandoned." *Id.* at 852–53.

Abandoned vehicles

A.R.S. § 28-4834 – Duty to investigate and remove abandoned cars; *State v. Richcreek*, 187 Ariz. 501 (1997).

Miscellaneous

State v. Allen, 216 Ariz. 320 (App. 2007). Owner of vehicle had very limited expectation of privacy in portion of car covered by tarp, where car was parked at apartment complex. Sergeant's action of lifting tarp was reasonable.

State v. Hernandez, 244 Ariz. 1 (2018). The test to determine if a defendant had a reasonable expectation of privacy in curtalige is one "of reasonableness, both of the possessor's expectations of privacy and of the officers' reasons for being on that driveway," *Id.* at 5 (*quoting*, *State v. Cobb*, 115 Ariz. 484, 489 (1977). An expectation of privacy generally attaches to a home's curtilage. Defendant who was a frequent overnight guest and was "contacted on the driveway's confluence with the back of the home which was at least partially obscured from public view," was found to have a reasonable expectation of privacy in the area. *Id.* [The court held,

however, that even though he had a reasonable expectation of privacy in the curtilage of his girlfriend's home, the warrant requirement did not apply because by failing to stop on the public roadway when the officer signaled and instead driving onto private property, Hernandez impliedly consented to the deputies' entry into the area to complete the traffic stop.]

2. **Was there a search or seizure?** [Did the actions of the officer rise to the level of a search or seizure?] If there was no "search" or "seizure" no justification is needed under the Fourth Amendment. *United States v. Drayton*, 536 U.S. 194, 200 (2002); *State v. Robles*, 171 Ariz. 441 (App. 1992). "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968).

Whren v. United States, 517 U.S. 806, 809-10 (1996). "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]."

NOT A SEIZURE

Non-custodial questioning/consensual encounters (reasonable suspicion not needed)

United States v. Mendenhall, 446 U.S. 544 (1980). Officers may ask to see an individual's identification without reasonable suspicion. The defendant was not seized when officers, who were not in uniform and did not display a weapon, identified themselves as officers and requested to see her airline ticket and identification in a public place while asking a few questions. It does not matter that the defendant was not told she could refuse to cooperate.

Florida v. Royer, 460 U.S. 491 (1983). While officers do not violate the Fourth Amendment by merely approaching a person in public and asking if he is willing to answer questions or by using the voluntary answers to those questions at trial, the individual may decline and leave the area.

United States v. Drayton, 536 U.S. 194 (2002). Under the Fourth Amendment, police may randomly approach individuals to ask questions and to request consent to search, provided a reasonable person would understand he or she is free to refuse. In general, officers are not required to inform individuals of their right not to cooperate and to refuse consent to searches. Officers may ask to frisk a person without reasonable suspicion, but may not coerce the suspect to give consent or conduct the frisk against their will without reasonable suspicion of criminal activity.

Even when they have no basis for suspecting a particular individual, officers may make inquiries, ask for identification, and request consent to search luggage as long as they are not coercive. "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. D*rayton*, at 200.

In *Drayton*, there was no seizure when three plain clothes police officers boarded a bus and questioned passengers. When one officer asked to check defendant's luggage, defendant agreed. The officer asked to frisk defendant, defendant agreed and the officer found drugs. The officer gave the passengers no reason to believe they had to answer questions, he spoke in a polite voice, did not brandish a weapon, and left the aisle free so individuals could exit.

Florida v. Bostick, 501 U.S. 429 (1991); *Florida v. Royer*, 460 U.S. 491 (1983); and *Drayton, supra.* each indicate officers may ask for consent to search items such as luggage.

State v.Robles, 171 Ariz. 441 (App. 1992).

Repeated requests can turn consensual contact into a seizure/detention

State v. Wyman, 197 Ariz. 10 (App. 2000). "[W]hen the officer incessantly repeated his request after the men refused to respond, he clearly demonstrated that they were not free to ignore him and go about their business." *Id.* at 13.

Suspect not seized until application of physical force or submission to a show of authority

When evaluating Fourth Amendment issues, it is important to remember an individual is not seized for purposes of the Fourth Amendment until there has been an application of physical force or a show of authority. If there is only a show of authority by the police, with no physical force, then no seizure occurs until the suspect submits to that show of authority. *Brendlin v. California,* 551 U.S. 249 (2007).

Commentary by Beth: For example, for traffic enforcement purposes in general, even if the officer has activated overhead lights, the suspect is not seized, and Fourth Amendment protections do not apply until the suspect reacts to the lights and submits to the show of authority with an action such as pulling over. A fleeing person (or even an unobservant one) has not been seized.

United States v. Mendenhall, 446 U.S. 544 (1980). "We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Mendenhall,* at 554.

Noting that for Fourth Amendment purposes a person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," the Court provided examples which might suggest a seizure. These include: "the threatening presence" of multiple police officers, an officer's display of a weapon, the physical touching of the individual, or coercive language or tone suggesting compliance with the officer's request is required. The court remarked: "[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Mendenhall,* at 555.

Michigan v. Chesternut, 486 U.S. 567 (1988). "Chasing" a suspect does not by itself constitute a seizure of that individual. The analysis will always involve the totality of the circumstances. The defendant, who discarded several packs of pills as he ran while the police drove alongside in a marked car, was not seized. The officers did not activate their siren or flashers, display a weapon, command the defendant to stop, attempt to block the defendant's course or control his movement. "While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure" *Chesternut*, at 575.

Broyer v. County of Inyo, 489 U.S. 593, 596 (1989). Police pursued defendant at high speeds for 20 miles. The fleeing defendant was not "seized" until he crashed into a police roadblock.

California v. Hodari D., 499 U.S. 621 (1991). Even if police make a show of authority, a defendant is not seized if he flees. When Hodari D. saw police officers, he ran and threw drugs before an officer tackled and handcuffed him. Because he was not "seized" until he was tacked, the cocaine he threw when running was properly seized by officer. The discarded cocaine was "not the fruit of a seizure" and was accordingly admissible. *Hodari D.*, at 629.

Brendlin v. California, 551 U.S. 249 (2007). "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restricts his freedom of movement." *Brendlin,* 551 U.S.at 254. "A police officer may make a seizure by show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Id.*

Florida v. Royer, 460 U.S. 491 (1983); *Brendlin, supra.*; *Mendenhall, supra.,* An officer's act of identifying himself as a police officer does not constitute a seizure.

State v. Robles, 171 Ariz. 441 (App. 1992). Officers may walk up to a parked car and ask questions.

State v. Gonzalez, 235 Ariz. 212 (App. 2014). Officer did not seize defendant even though he blocked in the car. Although, pulling in behind the car and blocking it, in a marked police car was show of authority for seizure, the defendant appeared unaware officer was there. Defendant did not submit to the show of authority.

Spotlight

State v. Stuart, 168 Ariz. 83 (App. 1990). Shining a spotlight on a parked vehicle was not a seizure under the facts of the case.

RULED NOT A SEARCH

Visual aids - As a general rule, using visual aids to see an item in plain view does not transform the contact into a search. There are, however, exceptions such as the use of thermal-imaging equipment. *See, United States v. Kyllo*, 533 U.S. 27 (2001).

Texas v. Brown, 460 U.S. 730 (1983). Shining a flashlight into the car's interior does not transform the incident into a search, nor does shifting position to obtain a better view. *Accord, United States v. Dunn*, 480 U.S. 294 (1987) (use of flashlight).

State v. Salazar, 27 Ariz.App. 620, 557 P.2d 552 (1976). Flashlight shined in vehicle.

State v. Stuart, 168 Ariz. 83 (App. 1990). Shining a spotlight on a parked vehicle was not a search under the facts of the case.

Dow Chemical Company v. United States, 476 U.S. 227 (1986). Taking aerial photographs of an industrial plant with a precision aerial mapping camera is not a search prohibited by the Fourth Amendment.

California v. Ciraolo, 476 U.S. 207 (1986). Aerial observation alone is not a search.

Dog Sniff

City of Indianapolis v. Edmond, 531 U.S. 32 (2000). Walking a drug-detection dog around the exterior of a car does not turn a

seizure into a search. "[A] an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics . . . and is 'much less intrusive than a typical search.'" *Edmond*, at 40 (*quoting, United States v. Place,* 462 U.S. 696, 707 (1983).)

Illinois v. Caballes, 543 U.S. 405 (2005). Walking a dog around a vehicle lawfully stopped for speeding while waiting for driver license information does not violate the Fourth Amendment where the dog sniff does not extend the length of detention. An alert by a reliable dog provides probable cause to search.

Rodriguez v. United States, 575 U.S. 348 (2015). Police may not extend the length of a traffic stop merely to conduct a dog sniff.

State v. Paredes, 167 Ariz. 609 (App. 1991). Dog sniff of the trunk of a vehicle.

Exterior of Vehicles/License Plates

Cardwell v. Lewis, 417 U.S. 583 (1974). Examination of the tire on the wheel and paint on the exterior of the car.

State v. Harding, 137 Ariz. 278 (1983). "[T]here was no search or seizure of the vehicle at the time the license check was made."

RULED A SEARCH

Blood draws
Schmerber v. California, 384 U.S. 757, 767 (1966). *State v. Flannigan*, 194 Ariz. 150, 978 P.2d 127 (App. 1998).

Urine tests
Ferguson v. City of Charleston, 532 U.S. 67 (2001).

Using thermal imaging equipment
United States v. Kyllo, 533 U.S. 27 (2001).

Manipulating, squeezing or moving an item

Arizona v. Hicks, 480 U.S. 321 (1987); *Minnesota v. Dickerson*, 508 U.S. 366 (1994); *Bond v. United* States, 529 U.S. 334 (2000).

[If it is immediately apparent the object is contraband, there is no violation. *Minnesota v. Dickerson, supra.*]

3. **Is there State action? [Government action]** The Fourth Amendment only applies to Government action. "The Fourth Amendment is 'wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with participation and knowledge of any governmental official." *Walter v. United States*, 447 U.S. 649, 656 (1980). Evidence will not be suppressed. *State v. Weekley,* 200 Ariz. 421, 27 P.3d 325 (App. 2001).

   Private security guards are not equivalent to police officers. A.R.S. § 32-2634.

   An off-duty police officer is still a "peace officer." *State v. Fontes,* 195 Ariz. 229, 232 (App. 1998).

   A private citizen can make an arrest for DUI. *State v. Chavez,* 208 Ariz. 606, 96 P. 3d 1093 (App. 2004).

   A.R.S. § 13-3884. Arrest by private person

   > A private person may make an arrest:
   >
   > 1. When the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony.
   >
   > 2. When a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.

B. **Second inquiry - Is there a violation**?

1. **Were the actions of the officer/Government reasonable**? If the officer's actions were reasonable for Fourth Amendment purposes, then there is no Fourth Amendment violation. The reasonableness of the search or seizure will generally depend on what the officers knew at that time. An after-the-fact analysis will not apply. (An exception to this rule is the inevitable discovery doctrine discussed below.) *Illinois v. Rodriguez*, 497 U.S. 177 (1990). **The later portion of the handout addresses this by topic.**

2. **Was there a valid warrant**? If the officers executed a valid warrant, there will generally be no Fourth Amendment violation.

C. **Third inquiry—Is there a warrant exception**?

1. Determine if the facts provide for a warrant exception. If they do, there is no Fourth Amendment violation.

2. Examples of exceptions
   a. Inevitable discovery
   b. Search incident to arrest
   c. Consent
   d. Community caretaking
   e. Exigency
   f. Inventory search
   g. Independent source
   h. Statutory exceptions

D. **Fourth inquiry - Is any evidence subject to suppression?** If there was a Fourth Amendment violation, contemplate what evidence, if any, was obtained from the illegal action of the State. If no evidence was seized as a result of that action, there is nothing to suppress. Similarly, if the defendant is seeking to suppress evidence that cannot be suppressed (such as identity) suppression is inappropriate. *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

E. **Final inquiry - Does the exclusionary rule apply?** Evidence obtained as a result of an illegal search or seizure may not be admissible at trial pursuant to the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643 (1961). Suppression of evidence, however, should be the rare exception, not something that is automatically imposed. "Suppression of evidence has always been our last resort, not our first impulse." *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016).

United States v. Leon, 468 U.S. 897 (1984). The exclusionary rule is not a right of the defendant. It applies only where it results "in appreciable deterrence." of future Fourth Amendment violations. *Leon,* at 909

(quoting *United States v. Janis,* 428 U.S. 433, 454 (1976)). The benefits of deterrence must outweigh the costs. The *Leon* Court ruled the exclusionary rule does not apply when officers conduct a search in "objectively reasonable reliance" on a warrant later held invalid. *Leon*, at 922. This is often referred to as the "good-faith rule." [This rule does not apply if the affiant, knowingly, intentionally or recklessly made a false statement to get the warrant and the false statement was necessary for the finding of probably cause. *Franks v. Delaware*, 438 U.S. 154 (1978).]

Herring v. United States, 555 U.S. 135 (2009). The exclusionary rule's sole purpose, is to deter future Fourth Amendment violations. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence . . . we conclude that when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." *Id.,* at 907–908, n. 6

Herring, contains a very nice discussion of the exclusionary rule. It upheld a search where police employees erred in maintaining records in a warrant database. "[I]solated," "nonrecurring" police negligence, we determined, lacks the culpability required to justify the harsh sanction of exclusion. *Herring*, 555 at 137.

Davis v. United States, 564 U.S. 229 (2011). When police officers reasonably rely on binding case law, the exclusionary rule does not apply even when the case law is later overturned. *Accord, State v. Valenzuela,* 239 Ariz. 299 (2016); *State v. Mixton*, 247 Ariz. 212 (App. 2019).

Illinois v. Krull, 480 U.S. 340 (1987), extended the good-faith exception to the exclusionary rule to searches conducted in reasonable reliance on subsequently invalidated statutes.